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American Civil Procedure (Book Review)

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BOOK REVIEWS

AMERICAN CIVIL PROCEDURE. By William Wirt Blume. New York: Prentice-Hall, Inc., 1955. Pp. xv, 432. $6.50.

The author of this book is a recognized authority in the field of civil procedure. He has written many law review articles and books on varied aspects of civil procedure. There can be no question but that he is uniquely qualified to write a textbook on American Civil Procedure.

I have read Professor Blume's book from the point of view of one who has spent many years studying, teaching and writing on civil procedure with specific reference to the law of New York. Read from such an approach, I find that the book gives an antiquated notion of the law of procedure presently effective in the State of New York. I shall leave to others the task of making a critical analysis of the book with reference to the law of other states.[1] I undertake here the limited role of examining the book with a view of determining the extent to which it is reflective of the present law of New York. In making the analysis, I set forth below several aspects of procedure treated by Professor Blume, and indicate in respect to them: (1) the existing law of New York; (2) Professor Blume's statement of the law; and (3) an occasional comment.

A. Service of Summons — Acquisition of Jurisdiction

(1) The last three decades have been notable in New York for statutory enactments authorizing acquisition of in personam jurisdiction over defendants absent from the jurisdiction.

Sections 52 and 52-a of the Vehicle and Traffic Law make possible the procurement of in personam jurisdiction of absentee motorists. Section 52, enacted in 1928, affects service of a summons on a nonresident motorist. Section 52-a affects service of a summons on a resident motorist who departs from the state.

Section 250 of the General Business Law, enacted in 1952, makes possible the procurement of in personam jurisdiction of nonresident owners and operators of aircraft who are absent from the state. The section authorizes the procurement of an in personam judgment if the primary service is made on a state official. In this respect, the statute corresponds to the motorist legislation.

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[1] See Frampton, Book Review, 8 J. LEGAL ED. 379 (1956); Schmulowitz, Book Review, 42 A.B.A.J. 258 (1956).

Section 229-b of the Civil Practice Act, enacted in 1940, authorizes service on a nonresident natural person doing business in New York by service of the summons upon his agent. Service thus made gives rise to in personam jurisdiction.

Section 227-a of the Civil Practice Act, enacted in 1949, authorizes service of a summons upon an attorney of record for a nonresident plaintiff in a subsequent action brought against the plaintiff (in the first action) by the defendant (in the first action). Commencement of the first action by the nonresident plaintiff is deemed a designation of his attorney as his agent to receive process in any action commenced against him by the defendant in any court of New York. Service of the summons on the attorney for the plaintiff in the first action sustains acquisition of in personam jurisdiction in the second action.

Section 235 of the Civil Practice Act, last revised in 1949, authorizes personal service without the state without an order in any case on a defendant domiciled in the state, and sustains in personam jurisdiction.

(2) Chapter 7 of Professor Blume's book deals with the commencement of a civil action. Subdivision C of the chapter titled, "How Commenced," includes a consideration of the methods of acquiring jurisdiction over a defendant. The subdivision comprises thirteen pages.[2] The introductory paragraph to this subdivision reads:

> Before a court can effectively act on a claim for relief, other than to dismiss it, jurisdiction over the claim must be invoked in the manner provided by law. The steps taken to invoke jurisdiction (1) in the old courts of common law, (2) in the old courts of chancery, (3) under codes patterned after the New York Code of 1848, and (4) under the Federal Rules of 1938, will be outlined separately.[3]

The problem of bringing defendants before the court, including proof of service of summons, is considered in six pages. The modern methods of effecting service of summons are disposed of in thirteen lines of the text. The significant problem of immunity of defendants from service of process is adverted to only in a brief footnote.[4]

(3) In my judgment, the modern statutory methods for acquiring in personam jurisdiction of defendants are of extreme significance and are first rate examples of modern devices to cope with the problem of acquiring jurisdiction over absentee defendants. It is difficult to see how readers of Professor Blume's book will get any notion of the great strides which have been made in this area of procedure.

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[2] Pp. 270-83.
[3] P. 270.
[4] P. 277 n.19.

B. Appearance

(1) The doctrine of appearance (general and special) constitutes for most students an elusive concept, and generally requires thorough analysis and amplification. The doctrine of special appearance has been explicitly developed in Section 237-a of the Civil Practice Act adopted in 1951.

(2) In Professor Blume's book, voluntary appearance takes the form of a footnote [5] consuming about fifteen lines, if we exclude citations to law review articles and A.L.R. treatment.

(3) In my judgment, this is a wholly inadequate treatment of an area of procedure which students have difficulty in understanding, and experts have difficulty in analyzing.

C. Joinder of Causes of Action

(1) Section 258 of the Civil Practice Act, last amended in 1949, contains most liberal provisions for joinder of causes of action. The section provides:

> The plaintiff may join in the same complaint two or more independent or alternate causes of action, regardless of consistency, whether they are such as were formerly denominated legal or equitable, provided that upon the application of any party the court may in its discretion direct a severance of the action or separate trials whenever required in the interest of justice. There may be a like joinder of causes of action when there are multiple parties and the requirements for joinder of parties are satisfied.

There is no limitation on the right of a plaintiff to join as many causes of action as he has, irrespective of their nature.

(2) Professor Blume, in dealing with the problem of joinder of claims,[6] sets forth the text of the provision governing joinder as it appeared in the New York Code of 1848,[7] though the stated provision bears no resemblance to the present Section 258 of the Civil Practice Act. Professor Blume sets forth the text of the liberal rule of joinder as expressed in the Federal Rules.

(3) The difficulty with this treatment is that readers may assume that the law of New York is quite antiquated in the light of the corresponding Federal Rule. The present liberal rule governing joinder of causes of action was expressed in the New York Civil Practice Act years before the Federal Rules of Civil Procedure became effective in 1938.

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[5] P. 275 n.9.
[6] Pp. 339-42.
[7] P. 340.

D. Joinder of Parties

(1) Section 212 of the Civil Practice Act, last amended in 1949, governs permissive joinder of parties. The section is extremely liberal in the allowance of joinder of parties.

(2) Professor Blume discusses the problem with reference to the restricted provisions of joinder as expressed in the New York Code of 1848. The more liberal aspects of later provisions in New York governing joinder of parties is disposed of by very brief references.[8]

(3) It is difficult to see how readers of Professor Blume's book can get any notion of the progress that has been made in recent years in this area of the law.

E. Counterclaims

(1) The Civil Practice Act is extremely liberal in the allowance of counterclaims. A defendant may set up as a counterclaim a cause of action whether the same is related to the plaintiff's cause of action or is wholly independent thereof.[9] A defendant may allege as many counterclaims as he has, whether they are legal or equitable.

(2) Professor Blume refers to the New York Code of 1848 which made no provision for counterclaims, and a section added thereto in 1852 which authorized a defendant to set up a counterclaim provided it arose out of the contract or transaction set forth in the complaint or was connected with the subject of the action.

(3) Professor Blume refers to the Federal Rule authorizing unrestricted counterclaims but omits to indicate that this was the rule in New York even prior to the adoption of the Federal Rules of Civil Procedure in 1938.

F. Demurrers and Motions Addressed to Pleadings

(1) Motions for judgment addressed to pleadings superseded the common-law demurrer in New York in 1921, and are governed by Rules of Civil Practice (Rules 106-111). These Rules make possible a quick and early determination of a case by the simple procedural device of a motion.

(2) Professor Blume refers to the common-law demurrer as governed by the New York Code of 1848,[10] but fails to indicate the substantial areas in which motions for judgment may be made in instances where the common-law demurrer could not achieve the purpose.

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[8] Pp. 336-38.
[9] N.Y. Civ. Prac. Act §§ 262, 266 (as amended in 1936).
[10] Pp. 362-64.

(3) Professor Blume refers to the Federal Rules but without noting that, in the main, the Federal Rules have been paralleled by the Rules of Civil Practice effective in New York for many years.

G. Interpleader

(1) The law affecting interpleader was substantially revised in New York in 1954.[11] An action of interpleader may be commenced by a stakeholder without procuring leave from the court. A defendant stakeholder may prosecute a defensive interpleader without application to the court.

(2) Professor Blume disposes of the whole matter of interpleader in a little more than six lines.[12]

(3) A reading of Professor Blume's treatment of the subject does not give the reader any clear notion as to the problems implicit in interpleader, nor does it give any indication of what efforts have been made to meet the problems.

In my judgment, Professor Blume who, as stated at the outset of this review, is uniquely equipped to present a modern picture of the state of civil procedure in this country, has failed to do so. The larger part of the book deals with antiquated and now superseded rules of procedure. The book is neither fair to the writer nor to the reader. It is not fair to the writer because of his possession of a thorough understanding of modern systems of procedure. It is unfair to the reader in that he is made familiar with much of what the law was but not enough of what the law is.

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AMERICAN CONSTITUTIONAL LAW. By Bernard Schwartz.† Cambridge, England: The University Press, 1955. Pp. xiv, 364. $5.00.

This treatise from a comparative law viewpoint (the British and French political systems supplying the comparative standards) adds the virtue of brevity to an accurate and comprehensive survey of American constitutional law. Approximately half of the pages (Part I. "The Structure") present an illuminating summary of leading cases and comments on the doctrine of judicial review, federalism and the traditional roles of the respective branches in tripartite gov-

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[11] See N.Y. CIV. PRAC. ACT §§ 285-87.

[12] P. 256.

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